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No. 1356

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JACK J. GRAY,
Petitioner,

vs.

HOWARD F. JOHNSON, Individually, and As Superintendent of the Osage Indian Agency, Pawhuska, Oklahoma, VIRGIL N. HARRINGTON, Individually, and As Area Director of Bureau of Indian Affairs, Muskogee, Oklahoma, and STUART UDALL, As Secretary of the Interior, and OKLAHOMA LAND & CATTLE COMPANY, an Oklahoma Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Jack J. Gray, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cause on February 8, 1968.

OPINIONS BELOW

The opinion of the Court below has not been officially or unofficially reported, but it is appended hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1968, a petition for rehearing was denied on March 8, 1968. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A., Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether, after approval by the Superintendent of the Indian Agency, under delegation of authority from the Secretary of the Interior, of an agricultural lease on restricted Indian lands executed by the Indian owner, and after the expiration of time to appeal the decision approving such lease has expired, the Secretary of Interior can cancel such lease at the request of the Indian owner because the Indian could obtain more rental?

2. Whether, 25 C.F.R., §2.14, promulgated by the Secretary of the Interior, which provides that the decision of the Superintendent, Area Director or Commissioner of Indian Affairs is never final "where it is found by higher authority that failure to appeal on the part of the Indian or Indian Tribe would result in inequity or injustice to the Indian or Indian Tribe," is so indefinite and vague as to be a violation of the due process clauses of the Fifth Amendment of the Constitution.

STATUTES AND REGULATIONS INVOLVED

United States Constitution, Fifth Amendment:

"No person shall be * * * deprived of life, liberty, or property, without due process of law."

34 Stat. 539, Sec. 7:

"That the lands, herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and lease said land for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: Provided, That parents of minor members, of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minor arrive at their majority: And, provided further, That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior."

Title 25, C.F.R., Subpart B, Appeals to the Area Director or to the Commissioner. §2.10 Appeal, how taken; time limit:

(a) "An interested party who wishes to appeal to the Area Director or Commissioner shall initiate his appeal by filing a written petition with the official who made the decision. Such official if requested by an Indian or Indian tribe shall render such assistance as is appropriate in the preparation of any appeal by an Indian or Indian tribe. The petition should give an identification of the case a statement of reasons for the appeal and any arguments the petitioner wishes to make. The petition must be received in such office within 20 days after the date of the mailing of the notice of the

decision complained of to the petitioner unless further time is granted, pursuant to the regulations in this part. The petitioner also may file an additional written statement of reasons and arguments or briefs with the Area Director or the Commissioner within 10 days after the filing of the petition."

Title 25, C.F.R., §2.14, Effect of failure to appeal:

"When any party fails to appeal a decision of the Superintendent, Area Director, or the Commissioner, that decision shall be final as to such party and will not be disturbed except for fraud or gross irregularity, or where it is found by higher authority that the failure to appeal on the part of an Indian or Indian tribe would result in an inequity or injustice to the Indian or Indian tribe."

STATEMENT OF FACTS

William Fletcher, a full blood Osage Indian, owns 400 acres of restricted Osage Indian land in Osage County, Oklahoma. The land is under the direct supervision of the Superintendent of the Osage Indian Agency. In June, 1964, petitioner, Jack J. Gray, learned that the land would be up for lease, and offered to give $1,325.00 cash rental per year and perform all of the soil conservation requirements established by the Osage Indian Agency for a ten year lease. The lease embodying the offer of the petitioner was prepared by the Branch of Realty of the Osage Indian Agency, forwarded to Fletcher in Oklahoma City. About two weeks later Fletcher returned the lease to the Agency duly signed. The Agency then forwarded the lease to Petitioner for signing and petitioner completed the lease and returned it to the Osage Agency for processing for approval on July 9, 1964. On July 20, 1964, the lease of the petitioner was approved by the Superintendent of the Osage Indian Agency, in the following language:

"The within lease is hereby approved and declared to be in accordance with the law and the rules and regulations prescribed by the Secretary of Interior thereunder and now in force."

Three months later in October, 1964, the Oklahoma Land & Cattle Company learned that the lease to petitioner Gray had been approved and sought to purchase the lease from petitioner. The petitioner refused to sell the lease to the Oklahoma Land & Cattle Company, and on October 27, 1964, the Oklahoma Land & Cattle Company obtained another lease signed by Fletcher, providing for a cash rental of $1,500.00, and caused the same to be forwarded to the Osage Indian Agency for approval. On November 3, 1964, the Superintendent of the Osage Indian Agency notified Fletcher that the land was already under an approved lease to Gray and refused to approve the lease to the Oklahoma Land & Cattle Company.

The Oklahoma Land & Cattle Company filed an appeal on November 24, 1964, from the decision of the Superintendent on November 3, 1964, to the respondent Area Director, in the name of Fletcher and itself. On March 18, 1965, the Area Director denied the appeal of William Fletcher and the Oklahoma Land & Cattle Company, finding that the action of the Superintendent of the Osage Indian Agency of November 3, 1964, "should not be superseded and set aside." Nevertheless the Area Director canceled the Gray lease as not in the best interest of the Indian, and directed that the land be offered for lease under sealed bids for a term not to exceed five (5) years.

Gray appealed to the Commissioner of Indian Affairs, who affirmed the decision of the Area Director. This decision was administratively affirmed by the Assistant Secretary of Interior acting for the Secretary.

The administrative remedies having been exhausted, Gray filed a Complaint in the United States District Court for the Northern District of Oklahoma, to judicially review the administrative action. Jurisdiction is vested under Title 28, U.S.C., §1361. After the issues were made up, Petitioner filed a motion for summary judgment. On July 17, 1967, the Court overruled the motion for summary judgment and affirmed the decision of the Secretary of the Interior. Appeal was taken to the United States Court of Appeals for the Tenth Circuit. Among the grounds urged in the Tenth Circuit was the following:

> "3. After the approval of appellant's (petitioner's) lease by the Superintendent and no appeal was taken therefrom within twenty (20) days, as provided by the regulations, the action of the Superintendent became final, and neither the Secretary of Interior, nor any of his subordinate officers had the jurisdiction to summarily rescind the approval of the appellant's (petitioner's) lease, and the action of the Secretary of the Interior deprived the appellant (petitioner) of his property rights without due process of law and in violation of Title 5, U.S.C., Sec. 1008.
>
> "4. The Secretary of the Interior had no authority to hold null and void the Jack Gray lease, and to do so was to deprive appellant (petitioner) of his property rights without due process of law in violation of 5 U.S.C., Sec. 1008."

The cause was submitted before Murrah, Chief Judge, Brackenstein, Circuit Judge, and Delehant, District Judge sitting by designation. With Murrah dissenting, the Tenth Circuit affirmed the decision of the District Court, holding that there was no time limit on appeal by restricted Indians; that they had a continual right of appeal under 25 C.F.R., §2.14, on ground of injustice or inequity.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals held the Indian had a continual right of appeal under the provisions of Title 25, C.F.R., §2.14. This Regulation under the applicable decisions of this Court is invalid for reason of indefiniteness. The question of the validity of this regulation is a matter of extreme importance, affecting some 50,000,000 acres of restricted Indian lands throughout the United States under the trusteeship of the U. S. Department of Interior. (U. S. Department of Interior's *American Department of Natural Resources*, Page 28, 1966). If the Secretary of Interior can overturn the approved contracts of the Indian owners of this 50,000,000 acres of land at any time a third party will offer the Indian more rental, then there is no such thing as a valid binding lease contract, and the rule of law upon which this country was founded will have been replaced by the rule of violence, and of power and of force. The decision of the Court of Appeals ignored the limitation of *Boesche* v. *Udall*, 373 U.S. 473, 10 L. Ed. 2d 491, 83 S. Ct. 1373:

> "We hold *only* that the Secretary has the power to correct administrative errors of the sort involved here by cancelation of leases in *proceedings timely instituted by competing applicants for the same land.*" (Emphasis added)

The Court of Appeals distinguished *Seaton* v. *The Texas Company*, D.C. Circuit, 256 F. 2d 718, and other similar cases upon the ground that:

> "The cases are distinguishable because they relate to no regulation such as 25 C.F.R., Sec. 2.14, which makes approval of the lease subject to a continuing right of appeal in the case of injustice to the Indian."

ARGUMENT

25 C.F.R., Sec. 2.10, limits the time to appeal from a decision of the Department of Interior to 20 days. The Court of Appeals held valid the Indian's appeal taken November 24, 1964, from the approval of the Gray lease on July 20, 1964, over four months later, upon basis of 25 C.F.R., §2.14.

25 C.F.R., §2.14, provides that the Indian can appeal at any time

> "where it is found by higher authority that the failure to appeal on the part of the Indian or Indian tribe would result in an inequity or injustice to the Indian or Indian tribe."

This regulation is clearly void as violating the due process clauses of the Fifth Amendment because of indefiniteness. The application of this regulation giving an indefinite time of appeal, after the limitation of twenty (20) days set by 25 C.F.R., §2.10, depends upon the determination "by higher authority" of what is "injustice" or "inequity." Neither of the terms "injustice" or "inequity" are defined. Both terms are elastic. What is the scope of the term "injustice" or "inequity?" By what standard is "injustice" to be measured? By what standard is "inequity" to be measured?

The language of this court in the case of *United States v. L. Cohen Grocery Company*, 255 U.S. 81, page 89, in discussing the terms "unjust" and "unreasonable" is applicable to the terms "inequity" and "injustice." These terms:

> "* * * leave open the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact we see no reason to doubt the soundness of the observation * * * that to attempt to enforce the section would be the exact equivalent of an effort

> to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust * * * in the estimation of the court."

In the case of *United States* v. *L. Cohen Grocery Company, supra,* this Court held Sec. 4 of the Lever Act void. This section made it unlawful for any person to "make any unjust or unreasonable * * * charge in * * * dealing in or with the necessaries." The terms "unjust" and "unreasonable" were held to have no commonly recognized or accepted meaning, and was so indefinite and vague that no one could know what it was. The same is true of the terms "inequity" and "injustice."

In *A. B. Small Company* v. *American Sugar Refining Company,* 267 U.S. 233, 69 L. Ed. 589, 45 S. Ct. 295, the same section was held void as pertaining to contractual rights because:

> "It was not the criminal penalty that was held invalid, but the execution of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."

Is there any difference between the terms "injustice" and "inequity" and the terms "unjust" and "unreasonable?" Does the term "injustice" and "inequity" have such a fixed and definite meaning as to be clearly understandable by all men of common intelligence? Or, are these terms so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application? In the regulations before this Court, what is "inequity" or "injustice" is left to the whim of the moment of the "higher authority" and subject his decision to the political pressures of the day. This court in the case of *Claude C. Connally, et al,* v. *General Construction Company,* 269 U.S. 385, 70 L. Ed. 322, 46 S. Ct. 126, page 391 of the U. S. Reporter stated the rule:

> "And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

The term "inequity" is not even defined in Black's Law Dictionary, 4th Edition, and the term "injustice" is defined as:

> "The withholding or denial of justice. In law, almost invariably applied to the act, fault or omission of a court, as distinguished from that of an individual."

Should leases on 50,000,000 acres of restricted Indian lands be subject to the declaration that they are void because of the whim of the moment of some higher authority? If this regulation is valid, then there is no such thing as a binding lease contract on any of this land, as the lease contract is never final.

This Court's decision in *Boesche* v. *Udall*, 373 U.S. 472, 10 L. Ed. 2d 491, 83 S. Ct. 1372, holding that the Secretary had the power to correct administrative errors by cancelation of leases, limited that power to *"proceedings timely instituted"* by competing applicants for the same land." (Emphasis added) The recognition by this Court in that case of the power of the Secretary to cancel leases was not an unbridled power, but one to cancel leases only when proceedings were timely instituted. This is a far cry from the continual right of appeal in case of injustices the Court of Appeals found to exist under 25 C.F.R., §2.14.

CONCLUSION

25 C.F.R., §2.14, applies to 50,000,000 acres of Indian lands. Under this Regulation, the Secretary has unlimited power to cancel any lease at any time the Indian comes up with a new lease for payment of more rental money.

Lease contracts are reduced by this regulation to tenancies at will of the Secretary, and the Secretary's authority is so absolute as to be inconsistent with the concept of government under law.

We respectfully urge this court to grant a Writ of Certiorari and review this question of the authority of the Secretary of Interior to cancel Indian leases without timely proceedings and to hold unconstitutional 25 C.F.R., §2.14.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

TENTH CIRCUIT

No. 9627—JANUARY TERM—1968

JACK J. GRAY,
Appellant,

v.

HOWARD F. JOHNSON, individually and as Superintendent of the Osage Indian Agency, Pawhuska, Oklahoma; VIRGIL N. HARRINGTON, individually, and as Area Director of the Bureau of Indian Affairs, Muskogee, Oklahoma; STUART UDALL as Secretary of the Interior; and OKLAHOMA LAND & CATTLE COMPANY,
Appellees.

} Appeal from the United States District Court for the Northern District of Oklahoma

---

Robert P. Kelly for Appellant.

Frank B. Friedman, Attorney, Department of Justice (J. Edward Williams, Acting Assistant Attorney General; Lawrence A. McSoud, United States Attorney; Hubert A. Marlow, Assistant United States Attorney; and A. Donald Mileur, Attorney, Department of Justice, were with him on the brief) for Appellees Johnson, Harrington and Udall.

Jesse J. Worten for Appellee Oklahoma Land & Cattle Company.

Before MURRAH, Chief Judge, BREITENSTEIN, Circuit Judge, and DELEHANT,* District Judge.

BREITENSTEIN, Circuit Judge.

The Secretary of the Interior held that a lease to appellant Gray of Osage Indian land was void because of violations of applicable regulations. Gray brought suit to review the decision of the Secretary. Jurisdiction is granted by 28 U.S.C. § 1361. The district court upheld the Secretary and this appeal followed.

William Fletcher, a full-blood Osage Indian, owns 400 acres of restricted Osage Indian land in Oklahoma. The land was leased to James who had difficulty in complying with lease terms. Appellee Oklahoma Land & Cattle Company, intervenor below and herein referred to as intervenor, learned that the James lease was to be cancelled. At the suggestion of Ware, the Chief of the Realty Section of the Osage Agency, intervenor secured from Fletcher a letter requesting the cancellation of the James lease and a signed lease running to intervenor and carrying a yearly rental of $1,094. Ware rejected the lease and told intervenor that he would inform it of future developments.

Later, appellant Gray told Ware that he would pay a yearly rental of $1,325 for the Fletcher land under a lease carrying a 10-year term. Ware prepared a lease to Gray and a notice to be signed by Fletcher for the cancellation of the James lease. Fletcher signed the lease and the can-

*Senior District Judge of the Eighth Circuit, sitting by designation.

cellation notice. Gray then executed the lease, and it was approved by the Superintendent of the Osage Agency on July 20, 1964. About three months later, the intervenor learned of the lease to Gray. It then obtained a lease from Fletcher for a 10-year term at a $1,500 annual rental and submitted the lease to the agency. The Superintendent denied approval on the ground that the land was leased to Gray.

Fletcher and intervenor appealed the decision of the Superintendent and asserted that the Gray lease should be cancelled and the lease to intervenor approved. The Area Director of the Bureau of Indian Affairs refused to approve intervenor's lease and denied the appeal as to the refusal of the Superintendent to approve that lease. The Area Director nevertheless cancelled the Gray lease and directed that the land be offered for lease under sealed bids for a term not to exceed five years. Gray appealed to the Commissioner of Indian Affairs who found the Gray lease void because of violations of applicable regulations. That decision was affirmed by an Assistant Secretary of the Interior acting for the Secretary. The administrative remedies have been exhausted.

Normally an appeal from action by a Superintendent on a lease must be taken within 20 days and no appeal was taken within that time. See 25 C.F.R. § 2.10. An exception is provided by 25 C.F.R. § 2.14 when it is found that failure to appeal results "in an inequity or injustice to the Indian." The Area Director found that the approval of the Gray lease was not in the best interest of the Indian. The district court agreed with this finding. It is sustained by the record. The local Indian Office knew of the interest of intervenor in the lease and took no steps to provide for competitive bids. The lease proposed by the intervenor carries a rental which is $175 a year higher than that provided by the lease to Gray. The Indian relied on

the Agency to look after his land and signed the papers which they submitted to him, sometimes without even reading them.

Gray argues that no appeal was taken from the approval of his lease but rather from the denial of the lease to intervenor. The appeal was taken by both Fletcher and intervenor. It attacks the validity of the Gray lease. At the most Gray's argument goes to the form of the appeal. The substance of the petition on appeal was sufficient to bring before the Area Director the issue of the validity of the approval of the Gray lease.

Gray further argues that the regulations permit an appeal by a party adversely affected and that Fletcher was not so affected because he signed the Gray lease and stated that he intended to honor it. The argument would be persuasive if applied to a person of full competency. We are concerned with a situation in which a lease cannot become effective until approved by an agency of the United States. See 25 U.S.C. §§ 393, 393a; and 25 C.F.R. § 131.5(a). The supervisory power is for the benefit of the Indian. We held in Bailey v. Banister, 10 Cir., 200 F.2d 683, 685, that the United States has the duty to get "the best possible price" for the Indian. As a practical matter, the Indian is adversely affected by the loss of that amount by which a competitively bargained for lease would exceed the amount of the Gray lease rent. In our opinion the appeal was permitted by the regulations and the findings of the Area Director.

The Secretary found that the ten-year lease to Gray was void for two violations of the regulations relating to the lease term. One regulation, 25 C.F.R. § 131.8, says that "the lease shall provide for periodic review, at not less than five-year intervals, of the equities involved." The lease is on a form bearing the title "U. S. Department of

the Interior, Bureau of Indian Affairs." It states that it is made "under and in accordance with the existing laws and regulations prescribed by the Secretary of the Interior, * * * which, by reference, are made a part hereof." The effect of this provision is to make the regulations a part of the lease by agreement of the parties. See Seber v. Spring Oil Co., N.D. Okl., 33 F.Supp. 805, 809. Hence, the five-year review provision was a part of the lease and the Secretary erred in holding that the lease was void because of failure to spell out in the lease the review requirement.

The Secretary also held that the Gray lease was void because it violated 25 C.F.R. § 131.8(c) which says that: "Farming leases not granted for the purpose of growing specialized crops shall not exceed five years for dry-farming land or ten years for irrigable land." The lease bears the title "Farming Lease." It covers 310 acres of grazing land. Of the remaining, 84 acres were to be planted in Bermuda grass during the term of the lease. Gray says that because so much of the area was grassland, or to become grassland, the action of the Secretary in classifying the land as dry-farming was arbitrary and capricious.

We are concerned with an interpretation by the Secretary of his own regulations. That interpretation has controlling weight "unless it is plainly erroneous or inconsistent with the regulation." See Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-414; Harvey v. Udall, 10 Cir., 384 F.2d 883. The Secretary interpreted the regulations to require that where a lease contains both dry-farm and grazing land, the term limitation relating to dry farmland controls. The Secretary's determination is supported by the nomenclature of the lease and the fact that part of the land was devoted to farming. Such decision is neither arbitrary, capricious, plainly erroneous, nor inconsistent with the regulation. In the circumstances, the execution of the lease was an administrative error which

the Secretary can correct by cancellation of the lease. See Boesche v. Udall, 373 U.S. 472, 485, and Pan American Petroleum Corporation v. Pierson, 10 Cir., 284 F.2d 649, 657, cert. denied 366 U.S. 936. We believe that the action of the Secretary was proper.

The cancellation of the lease does not deprive Gray of any vested property right. Gray cites Seaton v. Texas Co., D.C. Cir., 256 F.2d 718, and other cases to the point that once the United States, acting through an administrative agency, has granted unqualifiedly an interest in land, that grant may not be rescinded. The cases are distinguishable because they relate to no regulation such as 25 C.F.R. § 2.14 which makes approval of the lease subject to a continuing right of appeal in the case of injustice to the Indian. The Gray lease was attacked on an appeal by the Indian. The government did not act sua sponte. On appeal it was held that the lease was not in the best interest of the Indian and that it violated a pertinent regulation. Actions by the local agency contrary to the regulations and contrary to the best interest of the Indian do not create a vested right in the lease. Agents of the government must act within the bounds of their authority; and one who deals with them assumes the risk that they are so acting. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384.

Gray's reliance on § 9(a) and (b) of the Administrative Procedure Act does not help his cause. See 5 U.S.C. § 1008, reenacted in 1966 without significant change as 5 U.S.C. § 558. Subsection (a) forbids the imposition of a sanction "except within jurisdiction delegated to the agency and as authorized by law." We believe that the actions of the Secretary were proper under the applicable law and regulations. Subsection (b) says that a license may not be revoked without notice and without an opportunity being given to the holder to achieve compliance. We doubt

whether this subsection was intended to apply to the reversal on appeal of a subordinate's approval of proposed action. In any event Gray never offered to abandon his lease and comply with the regulations. His contention was and is that his lease is good. We have rejected that contention.

Affirmed.

(No. 9726—GRAY vs. JOHNSON, et al.)

MURRAH, Dissenting:

I cannot bring myself to believe that the Secretary is empowered to cancel this lease on appeal, out of time, on the ground of "inequity or injustice to the Indian" when the only alleged ground of inequity or injustice is that someone else offered an insubstantially higher price after the lease was duly approved by the Indian Agency Superintendent. There is no implication of fraud or over reaching even though the indian merely signed what was put before him. The Superintendent exercised the judgment, not the indian.

I would reverse.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACK J. GRAY,
Complainant,

vs.

HOWARD F. JOHNSON, Individually and as Superintendent of Osage Indian Agency, Pawhuska, Oklahoma; VIRGIL N. HARRINGTON, Individually and as Area Director of Bureau of Indian Affairs, Muskogee, Oklahoma; and STEWART UDALL as Secretary of Interior,
Defendants,
OKLAHOMA LAND AND CATTLE COMPANY, an Oklahoma Corporation,
Intervenor.

Civil No. 6433

Judgment

NOW on this 17th day of July, 1967, this matter comes on for decision before the Honorable Allen E. Barrow, Judge of the United States District Court for the Northern District of Oklahoma. The Plaintiff, Jack J. Gray, is present in person and is represented by his attorney, Robert P. Kelly. The defendants named in the Amended Complaint filed herein appear by Hubert A. Marlow, Assistant United States Attorney. The intervenor, Oklahoma Land and Cattle Company, appears by its attorneys, Jack N. Hays and Jesse J. Worten.

The Court has read and carefully studied the entire administrative record on the appeal to the Secretary of the Interior involved in this action. The Court has read and considered all of the briefs filed herein by each of the parties, and is fully advised in the premises.

For the reasons set forth in its remarks dictated into the record at the time of rendering this decision, the Court now holds that the Plaintiff's Motion for Summary Judgment is overruled, his prayer for reformation of the lease from the Indian owner to him is denied and the decision of the Secretary of the Interior and of the Area Director, holding the Jack Gray lease (No. 42347) null and void, is affirmed.

Signed this 20th day of July, 1967.

/s/ Allen E. Barrow
United States District Judge

APPROVED AS TO FORM:
/s/ Robert P. Kelly
/s/ Hubert A. Marlow
/s/ Jack N. Hays

APPENDIX C

(Seal)

In Reply Refer To:
Real Prop. Mgmt.
Ten. & Mgmt.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Washington, D. C. 20242

September 3, 1965

Mr. Jack Gray
Route 2, Box 29
Ralston, Oklahoma

Dear Mr. Gray.

This is in response to your appeal from a decision of the Area Director, Bureau of Indian Affairs, Federal Building, Muskogee, Oklahoma 74401, dated March 18, 1965, rescinding the approval of your lease, No. 42347, given by the Superintendent, Osage Agency, July 20, 1964.

The lease covers restricted land belonging to Mr. William Fletcher, unallotted Osage Indian, and is described as follows:

> SW¼ sec. 4, NW¼ and N½SW¼ sec. 9, T. 25 N., R. 6 E., Osage County, Oklahoma, containing 400 acres more or less

The above-described property consists of about 310 acres of grazing land and 90 acres of dry farming land.

We have given this matter careful consideration and have no alternative but to conclude that the lease is null

and void because it is contrary to applicable regulations and, therefore, beyond the approval authority of the Superintendent. Title 25, Code of Federal Regulations, Section 131.8(c) clearly states that "Farming leases not granted for the purpose of growing specialized crops shall not exceed five years for dry-farming land or ten years for irrigable land." Section 131.8(b) allows the making of farming leases for terms of up to 25 years if the farming purposes require the making of substantial investments for the purpose of producing specialized crops. The construction of stock water ponds, diversion terraces, the establishment of a Bermuda grass stand, fertilization, plowing, mowing weeds, and the overseeding with legumes do not constitute improvements required to produce specialized crops. Furthermore, the actual cash value of the improvements required by the void lease does not approach a substantial investment within the meaning of the regulation.

In addition, the lease is in conflict with 25 CFR 131.8. The pertinent portion of that section reads as follows:

> "Except for those leases authorized by §131.5(b)(1) and (2), unless the consideration for the lease is based primarily on percentages of income produced by the land, the lease shall provide for periodic review at not less than five-year intervals, of the equities involved."

This lease does not fall within the exceptions and the consideration is not based on percentages of rental produced; therefore, it must contain provisions for the review of equities.

As stated in the March 18 decision of the Area Director you will be permitted to continue in possession of the property until December 31, 1965. The rental for the calendar year 1965 is $1,325, which we assume you have already paid. Immediate steps will be taken to advertise this property

for lease to the highest bidder under sealed bid conditions for a term of not to exceed five years beginning January 1, 1966. We are instructing the Area Director to initiate action to refund to you the lease fee of $31.

The approval of this decision by the Secretary of the Interior exhausts the administrative appeals available under 25 CFR 2.

Sincerely yours,
(Sgd.) John O. Crow
Deputy Commissioner

Approved January 4, 1965
(Sgd.) Harry R. Anderson

Assistant Secretary of the Interior

Robert P. Kelly, Attorney at Law, Box 329, Pawhuska, Okla. 74056.

(Seal)

In Reply Refer To:
Real Prop. Mgmt.
Ten. & Mgmt.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Washington, D. C. 20242

April 1, 1966

Mr. Jack Gray
Route 2, Box 29
Ralston, Oklahoma 74650

Dear Mr. Gray:

Your attorney, Mr. Robert P. Kelly of McCoy, Kelly, and Gambill, Pawhuska, Oklahoma, has pointed out the clerical error involving the date on which Assistant Secretary of the Interior, Harry R. Anderson approved our de-

cision of September 3, 1965, on your appeal from the Muskogee Area Director's decision that lease No. 42347 is invalid. The decision was approved on January 4, 1966, not January 4, 1965, as was stamped on the letter.

In view of the fact that our decision was not communicated to you in the fall of 1965 prior to the time when it was necessary to prepare the land or seed crops for the 1966 crop year, and, since you have deposited with the Osage Agency rent for calendar year 1966, the next-to-last paragraph of our September 3, 1965, letter is hereby modified to permit you to harvest crops which were seeded prior to your receiving, on January 10, 1966, the Deputy Commissioner's decision of September 3, 1965, which was approved by the Assistant Secretary on January 4, 1966. You are accorded such rights to enter and use the premises as are reasonably necessary to husband and harvest such crops. The Area Director will be instructed to take action immediately to advertise the property for lease to the highest bidder under sealed bid conditions for a term of not to exceed five years to commerce on such date as he shall determine. The permission to enter and use the premises hereby granted is conditioned upon your harvesting said crops with dispatch and removing from the property in sufficient time to allow the new lessee to seed or prepare the land this fall for the 1967 crop.

If you comply with the foregoing conditions the sum which you deposited as rent for the year 1966 will be commuted to the date you vacate the premises. The Area Director may specify a date, conformable to the intent of the per-

mission herein contained, on which the right of entry and use hereby granted will finally terminate.

Sincerely yours,

(Sgd.) J. L. Norwood
Acting Deputy Commissioner

Approved: March 31, 1966

(Sgd.) Harry R. Anderson
Secretary of the Interior

Copy to: Mr. Robert P. Kelly, Attorney at Law,
Box 329, Pawhuska, Okla. 74056

APPENDIX D

BEFORE THE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, MUSKOGEE AREA OFFICE, DEPARTMENT OF THE INTERIOR

In the Matter of the Appeal of William Fletcher and the Oklahoma Land and Cattle Company.

Decision on Appeal

This is an appeal by William Fletcher, an unallotted fullblood Osage Indian, and the Oklahoma Land and Cattle Company, a Corporation, from a decision rendered by the Superintendent of the Osage Agency on the 3rd day of November, 1964. In this decision, the Superintendent refused to approve a lease dated October 26, 1964, in favor of the Oklahoma Land and Cattle Company at an annual consideration of $1,500.00, and gave as his reason the existence of a previously approved ten (10) year lease to Jack Gray.

Thereafter, on November 24, 1964, a petition to appeal from this decision was filed by William Fletcher and the Oklahoma Land and Cattle Company. The appellee, Jack

Gray, filed his response on December 14, 1964 and his supplemental response to said petition with the Superintendent of the Osage Agency on December 16, 1964. The appellants, upon receiving a copy of the response, filed their reply thereto on December 18, 1964.

On December 23, 1964, the appeal and related papers were forwarded to the Office of the Area Director, Muskogee Area Office, and received on December 24, 1964. The appellants, by and through their attorney of record, Jessie J. Worten, appeared at the Office of the Area Director on December 31, 1964, and requested the Area Director to suspend the approval of the Jack Gray lease and grant a hearing to the appellants before a decision was made on the appeal. The Area Director thereupon suspended the approval of the Jack Gray lease and granted an oral hearing to all parties. At the time of this suspension, the appellants were informed that they were to file a suitable bond to protect the interest of the Indian. Said bond in the amount of $25,000.00 was subsequently filed with the Area Director on January 8, 1965.

Pursuant to this request, the Area Director set this matter down for hearing at a fact finding conference on January 7, 1965, and on that day, the matter was continued until the 21st day of January, 1965, at which time both the appellant was present in person and by his attorney of record, Jessie J. Worten, of the law firm of Holliman, Brewer and Worten, and the appellee was present in person and by his attorney of record, Robert P. Kelly, of the law firm of McCoy, Kelly and Gambill. The Superintendent of the Osage Agency, Howard F. Johnson, and his Field Solicitor, John M. Slater, were also present. Whereupon, the Area Director proceeded to hear the evidence of witnesses on the issues involved herein and after due consideration of all of the issues raised by this appeal, the Area Director finds the pertinent facts to be as follows, to wit:

(1) That this appeal has been pursued in accordance with the governing regulations found in 25 CFR Part 2, and that copies of all appeal briefs and answers thereto have been served on the interested parties,

(2) That William Fletcher, an unallotted fullblood Osage Indian, owns 400 acres of restricted Osage Indian land, described as follows:

SW¼ of Section 4; NW¼ and N½ SW¼ of Section 9, all in Township 25 North, Range 6 East, Osage County, Oklahoma.

That this land was leased to Mrs. F. W. James on the 1st day of June, 1960, under an approved lease No. 41063, hereinafter referred to as the James lease. That said lease provided an annual rental of $1,094.00 for a period of five (5) years, payable quarterly, and in addition said lease provided certain land improvements at a value of $580.00.

(3) That on the 7th day of April, 1964, William Fletcher executed a proposed lease on the above described property for a term of five (5) years in favor of the Oklahoma Land and Cattle Company at a consideration of $1,094.00 per annum plus the required land improvement stipulations. That this lease was duly submitted to the Osage Agency by a representative of the Oklahoma Land and Cattle Company, together with a letter of even date signed by William Fletcher requesting that, at the appropriate time, the lease be approved. This letter alludes to the fact the Osage Agency was contemplating the cancellation of the James Lease. The Agency returned the lease to Mr. W. C. Row, Agent, Oklahoma Land and Cattle Company, and informed him that under the existing regulations, 25 CFR 131.5(e), a lease could not be executed more than twelve (12) months prior to the commencement of the term of the new lease. That the Osage Agency retained the letter of transmittal in the Fletcher file.

(4) That Lease No. 42347 is in favor of Jack Gray, on the above described property, and for the sum of $1,325.00 annual rental, payable quarterly, plus certain land improvements, for the term of ten (10) years beginning on the 1st day of January, 1965, and ending on the 31st day of December, 1974. The record shows that on the 23rd day of June, 1964, the Agency prepared the Gray lease for the signature of William Fletcher.

(5) That on the 7th day of July, 1964, the Agency received the cancellation request and the Gray lease, both executed by William Fletcher. That the Gray lease was signed by Fletcher without witnesses. That the evidence shows Fletcher admitted under oath that he had signed the lease. That thereafter, the Gray lease was completed by Gray and his bondsmen. That upon receipt of the cancellation agreement and the Gray lease, the Superintendent of the Osage Agency subsequently approved the same on July 20, 1964. That at the time of his approval, the Superintendent had in hand William Fletcher's letter of April 7, 1964, indicating his desire to lease to the Oklahoma Land and Cattle Company.

(6) That thereafter the Oklahoma Land and Cattle Company presented a second lease dated the 26th day of October, 1964, to the Superintendent for approval. The approval of this lease was denied by the Superintendent in letter dated November 3, 1964.

(7) That on July 20, 1964, the date the cancellation became effective, Gray was granted possession of the property under trespass conditions for the remainder of calendar year 1964 and tendered the quarterly rental provided in the James lease to the Superintendent.

(8) That Jack Gray has expended $236.32 on permanent improvements to the property broken down as follows: diversion terrace $166.32, relocation of fence $70.00.

We have examined the record in all its aspects and conclude on the basis of the facts and evidence in the record, there were no acts of fraud, actual or constructive, duress or undue influence perpetrated or exercised on any person in this appeal.

The appellant has brought this appeal seeking affirmative action on the following points, to wit:

(1) Cancellation of the Gray lease on the grounds it was erroneously approved under mistake of fact by the Superintendent,

(2) That the lease executed by Fletcher to the Oklahoma Land and Cattle Company, dated October 26, 1964, should be approved by the Superintendent, and,

(3) That the action of the Superintendent taken in his letter to appellants dated November 3, 1964, be superseded and set aside.

1. Our first consideration is to determine if the land in question was available for leasing on October 26, 1964.

The evidence in the record shows that on October 26, 1964, the date of the proposed new lease to Oklahoma Land and Cattle Company, there was a lease of record in favor of Jack Gray, approved July 20, 1964, for a ten (10) year period beginning January 1, 1965.

It is elementary and basic that overlapping leases may not be granted or approved.

In this connection, the evidence shows William Fletcher, of his own free will, executed Lease No. 42347. This lease was approved under delegated authority by the Superintendent. The evidence also reflects the Superintendent had access to the Agency file on the Gray lease at the time of approval. It further shows that the Oklahoma Land and

Cattle Company was not privy to this contract, and therefore, was not an interested party at the time of approval.

In view of the foregoing evidence, it is our opinion that the action of the Superintendent of the Osage Agency documented by his letter of November 3, 1964, should not be superseded and set aside. Therefore, the appeal of William Fletcher and the Oklahoma Land and Cattle Company in this case is hereby denied.

2. In giving full consideration to the contentions and arguments made by all parties to this appeal, we have weighed the evidence on the terms and conditions of the Gray lease.

We did this because under the rules and regulations providing for this proceeding, it is apparent that our decision need not be limited to the points brought forth by the litigating parties but must encompass all of the facts and evidence obtainable, not only from the fact finding conference, but our own independent investigation, utilization of administrative procedures and implementation of our fiduciary relationship with Indians.

It is definitely established from the testimony and the tenor of the documented evidence, that William Fletcher sought as much rental for his property as could be obtained.

It goes without saying that all officials and employees of the Bureau of Indian Affairs are under a duty and obligation, within the rules and regulations, to carry out the policy of the Bureau, and in all cases are to be governed in their official actions by the premise of what is best for the Indian involved.

It is clear from the evidence that the officials of the Osage Agency had knowledge of the competitive demand

for this land. It is also clear that William Fletcher was not advised of this fact. This course of action pursued by the pertinent Agency officials was detrimental to the best interests of William Fletcher in that he did not receive the highest return obtainable. Thus, the approval of the lease to Jack Gray was not in the best interest of the Indian.

We now examine the tenure of the lease and the land use stipulations found therein. These must benefit the Indian owner, otherwise, the lease must fail.

The evidence shows that both the Gray lease and the proposed Oklahoma Land and Cattle Company lease are for a ten (10) year period. It further shows that all prior leases on subject land were for five (5) year periods. The question now becomes one of determining the justification for the increase in tenure. To decide this, we must consider both the facts and rules and regulations on the point.

Here it must be said that as a general rule long term leasing of dry farm land does not result in a contract which is always in the best interest of the Indian. As a matter of fact, we have a definite statutory limitation on leasing of dry farm land for periods not in excess of five (5) years. We refer to 25 CFR 131.8(c) which provides as follows:

> "(c) Farming leases not granted for the purpose of growing specialized crops shall *not exceed five years for dry farming land* or ten years for irrigable land." (Emphasis ours)

There is no evidence in this record that irrigable land is involved in the case at hand; nor do we find a rule or regulation which authorizes extending a combination farming and grazing lease beyond the term limited or applicable to dry farm land.

To sustain the instant leases, it must be very clear that the existence of 300 acres of grass land is sufficient to over-

come the limitation on the leasing of dry farm land. In making our determination on this point, we must consider the evidence in the record as well as other factors which govern the land leasing market as it exists at the present time.

In our investigation of this matter, it is apparent that the changing economic conditions in the past in Osage County indicate an upward trend in land and rental values. In view of this current situation, it appears the granting of a ten (10) year lease would not best serve the Indian. What are the physical facts in the case at hand?

It is undisputed that approximately 90 acres of dry farm land is included in the 400 acre unit and that the property contains a dwelling and other farm buildings. The record shows improvements were to be made on both the dry farming and grazing land. It is obvious that the overall effect of these requirements is to change the land use pattern of the crop land.

We, therefore, must conclude that present regulations do not authorize an increase in term of this lease to ten (10) years, nor do we find from the record extenuating facts and circumstances which would justify downgrading of dry farm lease into a grazing lease so that it might be extended to a ten (10) year term.

It is our decision that the approval of the Gray lease was not within the scope of pertinent rules and regulations governing said transaction and further, said lease did not bring the maximum obtainable rental to William Fletcher, therefore, for these reasons, the approval of the Gray lease is hereby rescinded.

The Superintendent of the Osage Agency is directed to take such action as is appropriate to implement this

decision in accordance with pertinent rules and regulations. Any implementation of this decision should:

(1) Permit Jack Gray to continue in possession of the leased premises until December 31, 1965.

(2) Insure that William Fletcher receive one (1) years trespass rental at $1,325.00 per year, less actual expenditures for permanent improvements made by Jack Gray.

(3) As indicated by Mr. Fletcher's testimony, offer a lease on the premises to the highest and best bidder under sealed bid conditions. Term of the lease should not exceed five (5) years.

In accordance with existing regulations, an appeal may be made from this decision. Pursuant to the provisions of 25 CFR 2.10, any interested party is hereby given twenty (20) days after the date of mailing this decision in which to file his petition of appeal in this office.

Dated this 18th day of March, 1965.

/s/ Virgil N. Harrington
Area Director

APPENDIX E

Realty—Lease
L—42347

Osage Agency
Pawhuska, Oklahoma

Mr. William Fletcher
1304 McDonald Street
Midwest City, Oklahoma

Dear Mr. Fletcher:

This will acknowledge your letter of October 27, 1964, in regards to a lease on certain of your land in Osage County.

The land you want the Oklahoma Land and Cattle Company to have is under an approved lease until December 31, 1974. This lease was executed by you and subsequently approved by the Superintendent July 20, 1964 to Mr. Jack Gray, and is a valid and binding contract. As is the case with most contracts, the fact that one party may wish to change his mind during the term of the instrument, is not grounds for cancellation.

The process of assignment or cancellation are the only two ways that another lessee can gain possession during the life of an existing formally approved lease. With either method all parties to the contract, including the present lessee, have to agree.

Sincerely yours,

/s/ H. F. Johnson
Superintendent

HF Johnson:JM Ware:fcj 11-3-64
File Copy
Chrony file copy

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1356

JACK J. GRAY, PETITIONER

v.

HOWARD F. JOHNSON, INDIVIDUALLY, AND AS SUPERINTENDENT OF THE OSAGE INDIAN AGENCY, PAWHUSKA, OKLAHOMA, VIRGIL N. HARRINGTON, INDIVIDUALLY, AND AS AREA DIRECTOR OF BUREAU OF INDIAN AFFAIRS, MUSKOGEE, OKLAHOMA, AND STUART UDALL, AS SECRETRY OF THE INTERIOR, AND OKLAHOMA LAND & CATTLE COMPANY, AN OKLAHOMA CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The judgment of the district court (Pet. App. B) is not reported. The administrative decision, which became the Secretary of the Interior's final order (Pet. App. C), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1968. The petition for a writ of cer-

tiorari was filed on April 23, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior had discretionary authority to accept an appeal from an administrative decision by a subordinate filed one day late.

REGULATIONS INVOLVED

25 C.F.R. 131.8 provides in pertinent part as follows:

> Leases granted or approved under this part shall be limited to the minimum duration, commensurate with the purpose of the lease, that will allow the highest economic return to the owner consistent with prudent management and conservation practices, and except as otherwise provided in this part shall not exceed the number of years provided for in this section. Except for those leases authorized by § 131.5(b) (1) and (2), unless the consideration for the lease is based primarily on percentages of income produced by the land, the lease shall provide for periodic review, at not less than five-year intervals, of the equities involved. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by the contract or the contribution value of such improvements. Any adjustments of rental resulting from such review may be made by the Secretary where he has the authority to grant leases, otherwise the adjustment must be made

with the written concurrence of the owners and the approval of the Secretary.

* * * * *

(c) Farming leases not granted for the purpose of growing specialized crops shall not exceed five years for dry-farming land or ten years for irrigable land.

(d) Grazing leases which require substantial development or improvement of the land shall not exceed ten years.

25 C.F.R. 2.14 provides:

When any party fails to appeal a decision of the Superintendent, Area Director, or the Commissioner, that decision shall be final as to such party and will not be disturbed except for fraud or gross irregularity, or where it is found by higher authority that the failure to appeal on the part of an Indian or Indian tribe would result in an inequity or injustice to the Indian or Indian tribe.

25 C.F.R. 2.10(a) provides:

An interested party who wishes to appeal to the Area Director or Commissioner shall initiate his appeal by filing a written petition with the official who made the decision. Such official if requested by an Indian or Indian tribe shall render such assistance as is appropriate in the preparation of any appeal by an Indian or Indian tribe. The petition should give an identification of the case a statement of reasons for the appeal and any arguments the petitioner wishes to make. The petition must be received in such office within 20 days after the date of the mailing of the notice of the decision complained of to the petitioner unless further time

is granted pursuant to the regulations in this part. The petitioner also may file an additional written statement of reasons and arguments or briefs with the Area Director or the Commissioner within 10 days after the filing of the petition.

25 C.F.R. 2.4 provides:

> Notice shall be given of any action taken or decision made from which an appeal may be taken under the regulations in this part, to any Indian or Indian tribe whose legal rights or privileges are affected thereby. This notice shall be in writing and shall be given by the official making the decision or taking the action. Failure to give such notice shall not affect the validity of the action or decision, but the right to appeal therefrom shall continue under the regulations in this part for the periods hereinafter set forth.

25 C.F.R. 2.35 provides:

> The period for filing or serving any document may be extended or waived on behalf of an interested party by the officer to whom the appeal is taken, for good cause found by the officer. The Secretary in his discretion may extend or waive any time limitation established by these regulations.

STATEMENT

This case involves the right to lease restricted Indian lands under the supervision of the Bureau of Indian Affairs, Department of the Interior. Two parties, Oklahoma Land & Cattle Company and petitioner Gray, were interested in leasing land owned by a restricted Osage Indian, William Fletcher. The

Oklahoma Land & Cattle Company and the Indian signed a lease in April 1964 which the Osage Agency, Pawhuska, Oklahoma, refused to approve because of a prior outstanding lease (Pet. App. A2, A16). The Superintendent of the Agency approved a subsequent lease from the Indian to petitioner Gray on July 20, 1964, without competitive bidding. Gray's lease term was to begin on January 1, 1965 (Pet. App. A17, A22). Oklahoma Land & Cattle Company later learned of this action by the Superintendent, obtained another lease at a higher rental from the Indian and submitted it to the Osage Agency (Pet. App. A3). By letter dated November 3, 1964 (Pet. App. E), the Superintendent informed Fletcher that he had previously approved the lease to Gray on July 20, 1964, and for that reason denied approval of the lease submitted by Oklahoma Land & Cattle Company.

On November 24, 1964, Fletcher and Oklahoma Land & Cattle Company filed an appeal from the Superintendent's decision to the Area Director, Bureau of Indian Affairs (Pet. App. A14). The Area Director cancelled the Gray lease because it was in violation of 25 C.F.R. 131.8(c)[1] and contrary to the best interests of the Indian. The Area Director directed that the land be leased under sealed bidding (Pet. App. A14–A22). His decision was affirmed by the Secretary of the Interior (Pet. App. A10–A12),

[1] 25 C.F.R. 131.8(c) prohibits the issuance of dry-farming leases for more than five-year periods. The lease in question was a combination dry-farming and grazing lease for a period of 10 years. The Secretary held and the court of appeals agreed that the limitation on dry-farming leases should apply to combination dry-farming and grazing leases.

by the United States District Court for the Northern District of Oklahoma (Pet. App. A8–A9) and by the United States Court of Appeals for the Tenth Circuit (Pet. App. A1–A7).

ARGUMENT

Petitioner argues that this Court should grant certiorari to consider the validity of 25 C.F.R. 2.14 under the Due Process Clause of the Fifth Amendment. Petitioner also claims that the validity of this regulation will affect the certainty of leases on some 50,000,000 acres of restricted Indian lands. Petitioner's argument is based on the following from the opinion of the court of appeals (Pet. App. A6):

> The cancellation of the lease does not deprive Gray of any vested property right. Gray cites *Seaton* v. *Texas Co.*, D.C. Cir., 256 F. 2d 718, and other cases to the point that once the United States, acting through an administrative agency, has granted unqualifiedly an interest in land, that grant may not be rescinded. The cases are distinguishable because they relate to no regulation such as 25 C.F.R. § 2.14 which makes approval of the lease subject to a continuing right of appeal in the case of injustice to the Indian. * * *

But there is no occasion in this case to decide whether, under 25 C.F.R. 2.14, the Secretary can cancel a lease at any time if the lease results in an injustice to an Indian. Fletcher's appeal from the decision by the Superintendent approving the Gray lease was filed no more than one day late. The Superintendent approved the lease to Gray on July 20, 1964, and it is undisputed that no written notice was given the Indian

of this final approval by the Superintendent until November 3, 1964 (Pet. App. A23, Pet. 5). 25 C.F.R. 2.4, *supra,* provides for a continuing right of appeal unless an Indian is given written notice of a final action affecting his rights.[2] Assuming that the notice dated November 3, 1964, was mailed on the same day, Fletcher's appeal on November 24, 1964, was filed one day late under the provisions of 25 C.F.R. 2.10(a), *supra,* allowing 20 days after notice of a final action for filing a notice of appeal, "unless further time is granted pursuant to the regulations in this part." The 20-day limit is discretionary and can be waived under the provisions of 25 C.F.R. 2.35, *supra.* Thus, the Area Director, under delegated authority, accepted an appeal filed by Fletcher 21 days after Fletcher was sent notice of the action by the Superintendent affecting his interests. Gray was not to enter on the leased land pursuant to the terms of his lease until January 1, 1965, more than a month following Fletcher's notice of appeal.

Thus, the only real issue raised by the petition is whether the Secretary and his subordinates have the authority to accept a notice of appeal filed one day late and prior to petitioner's entry upon the land. This Court has held that the Secretary's discretion as to matters within his jurisdiction is broad. *Udall* v. *Tallman,* 380 U.S. 1, 16; *Boesche* v. *Udall,* 373 U.S. 472. The decision of the court of appeals is not in conflict with any decision of this Court or any other

[2] The court of appeals upheld the administrative finding that Fletcher was adversely affected by the decision approving the Gray lease (Pet. App. A3).

Circuit. In view of the narrow legal issue presented, review by this Court is not warranted.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
CLYDE O. MARTZ,
Assistant Attorney General.
A. DONALD MILEUR,
FRANK B. FRIEDMAN,
Attorneys.

MAY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968